(2)

No. 91-1526

In The

Supreme Court of the United States

October Term, 1991

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

On March 16, 1992, Petitioner filed his petition for writ of certiorari, in which he noted that the same First Amendment issue which he raised was pending before the Ninth Circuit in a pre-enforcement challenge to RICO forfeitures in obscenity cases. On March 12, as Petitioner's brief was being printed, the Ninth Circuit rendered its decision in that case, *Adult Video Association v. Barr*, 1992 WL 44493,[1] holding that the RICO forfeiture provision is facially unconstitutional insofar as "section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense." 1992 WL 44493, at *8. This decision creates a direct conflict between the Ninth Circuit on the one hand and the Fourth and Eighth Circuits on the other, regarding the constitutionality of blanket forfeitures under § 18 U.S.C. 1963(a) as punishment for obscenity offenses.

This newly rendered decision in *Adult Video Association v. Barr* has created direct splits of authority among the federal circuits on *both* questions Petitioner has presented in this case. Whereas the Fourth Circuit in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1989), and the Eighth Circuit below held that unlimited RICO forfeitures upon conviction for obscenity did not even implicate the First Amendment, the Ninth Circuit has now unanimously held that the First Amendment both requires scrutiny of the post-conviction remedy, and does indeed impose limits on obscenity-based RICO forfeitures.

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[1] Petitioner's counsel in this case are also the attorneys for the plaintiffs in *Adult Video Association v. Barr*.

The Ninth Circuit held in *Adult Video Association* that "the breadth of RICO's current forfeiture provision is incompatible with the First Amendment," so that "tailoring of the scope of forfeiture is necessary." 1992 WL at 44493, at *10, *6. The court concluded that because such forfeitures jeopardize First Amendment interests, i.e., the right of the public to receive information and the right of the distributor to disseminate it, "those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited." 1992 WL at 44493, at *9. Overbroad forfeitures, the court noted, "hurt not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes." *Id.* at *9.

Citing this Court's recent decision in *Simon & Schuster,* the court concluded that "the incremental contribution that RICO's current sweeping forfeiture provisions make to the deterrence and destruction of criminal enterprises over what would be accomplished under a narrower definition of forfeitable assets does not justify the additional curtailment of constitutionally protected, sexually explicit speech." *Id.* The case at bar dramatically illustrates these concerns, where the government has closed virtually every erotica outlet in the Minneapolis/St. Paul area and has burned their protected inventories merely because seven items were found to be obscene.

As the *Wall Street Journal* observed, this Ninth Circuit decision is particularly "notable because it contradicts two federal appeals court rulings elsewhere in the country." Arthur S. Hayes & Neal Templin, "RICO Is Restricted in Pornography Cases," *Wall St. J.*, March 18,

1992, at B3. In those cases, as noted above, the Fourth and Eighth Circuits have held that once a defendant is convicted of obscenity offenses, the First Amendment becomes irrelevant and the mandatory language of § 1963(a) requires the court to forfeit the entire "enterprise."

The Ninth Circuit's decision in *Adult Video Association v. Barr* not only creates a dramatic split among the circuits on this question, it creates an *additional* split of authority which underscores the necessity of this Court's review. There is now a *three-way* split between this "middle ground" position, the Fourth and Eighth Circuit cases upholding RICO forfeitures, and the Arizona courts' holding that a statute authorizing massive forfeitures in obscenity cases would be facially invalid as a prior restraint under *Near v. Minnesota. State v. Feld,* 157 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987); *see also United States v. California Publishers Liquidating Corporation,* 778 F. Supp. 1377 (N.D. Tex. 1991).

Unfortunately, therefore, the Ninth Circuit's decision has only further muddied the waters, especially as it leaves "for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment." 1992 WL at 44493, at *9. This solution of the First Amendment problems posed by RICO forfeitures seems particularly anomalous, as it requires the courts to "rewrite" § 1963(a) piecemeal in individual cases, whereas the statute on its face *mandates* blanket forfeiture as the remedy. In short, the Ninth Circuit has neither sustained nor interpreted the challenged RICO forfeiture provisions, although it has to an unspecified extent invalidated them.

This opinion epitomizes the doctrinal confusion surrounding the government's use of the forfeiture remedy in obscenity cases, an issue which more clearly than ever requires immediate resolution by this Court. In contrast to the Fourth and Eighth Circuits, the Ninth Circuit has significantly restricted the use of RICO in obscenity cases, but has left district courts the daunting task of determining precisely where the undefined constitutional boundary lies. This unsettled state of the law will inevitably create disarray and disparity among the judgments district courts will order in these sensitive First Amendment cases, some following the Fourth and Eighth Circuit rule that blanket forfeitures are both constitutional and mandatory, others struggling to fashion an appropriately limited remedy under the Ninth Circuit rule, and some potentially adopting the Arizona rule that these forfeitures are simply unconstitutional. Given this widespread confusion among the various jurisdictions, the time for this Court to intervene to resolve this important question is now.

Respectfully submitted,

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